

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

STATE OF TEXAS, AND MAYO
PHARMACY, INC., A NORTH DAKOTA
CORPORATION,
Plaintiffs,

v.

XAVIER BECERRA, in his official capacity
as Secretary of Health and Human Services;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS,
Defendants.

No. 7:23-cv-22-DC

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' NOTICE OF ADMINISTRATIVE RECORD

Plaintiffs submit these objections to Defendants' notice, certification, and filing of the administrative record, ECF No. 54.

1) HHS impermissibly omitted the following items as part of the administrative record for the July 13, 2022 guidance (Original Guidance), Dkt. 1-2 at 3:

- a. Executive Order 14,076, "Protecting Access to Reproductive Healthcare Services" (July 8, 2022) (cited in the original guidance press announcement, see Dkt. 1-1 at 2).
- b. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022) (cited in the original guidance, and referenced in the original guidance press announcement).

- c. HHS's Guidance on Nondiscrimination Protections under the Church Amendments, <https://www.hhs.gov/conscience/conscience-protections/guidance-church-amendments-protections/index.html> (cited in the original guidance).
- d. The ReproductiveRights.gov website as of July 13, 2022 (cited in the original guidance press announcement).
- e. HHS, "Readout: Secretaries Becerra, Walsh meet with health insurers, employee benefit plan stakeholders to discuss birth control coverage" (June 27, 2022), <https://www.hhs.gov/about/news/2022/06/27/readout-secretaries-becerra-walsh-meet-with-health-insurers-employee-benefit-plan-stakeholders-to-discuss-birth-control-coverage.html> (cited in the original guidance press announcement).
- f. HHS, "HHS Issues Guidance to Protect Patient Privacy in Wake of Supreme Court Decision on Roe" (June 29, 2022), <https://www.hhs.gov/about/news/2022/06/29/hhs-issues-guidance-to-protect-patient-privacy-in-wake-of-supreme-court-decision-on-roe.html> (cited in the original guidance press announcement).
- g. HHS, "Remarks by Secretary Xavier Becerra at the Press Conference in Response to President Biden's Directive following Overturning of Roe v. Wade" (June 28, 2022), <https://www.hhs.gov/about/news/2022/06/28/remarks-by-secretary-xavier-becerra-at-the-press-conference-in-response-to-president-bidens-directive->

following-overturning-of-roe-v-wade.html (cited in “HHS Issues Guidance to Protect Patient Privacy in Wake of Supreme Court Decision on Roe”).

- h. HHS, “HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care” (June 29, 2022), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html> (cited in “HHS Issues Guidance to Protect Patient Privacy in Wake of Supreme Court Decision on Roe”).
- i. HHS, “Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet” (June 29, 2022), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html> (cited in “HHS Issues Guidance to Protect Patient Privacy in Wake of Supreme Court Decision on Roe”).
- j. HHS, “HHS Announces New Grants to Bolster Family Planner Provider Training” (June 30, 2022), <https://www.hhs.gov/about/news/2022/06/30/hhs-announces-new-grants-to-bolster-family-planner-provider-training.html> (cited in original guidance press announcement).
- k. HHS, “Readout of Secretary Becerra’s call with Governors in Wake of Supreme Court Decision on Roe” (June 30, 2022), <https://www.hhs.gov/about/news/2022/06/30/readout-of-secretary-becerras-call-with-governors-in-wake-of-supreme-court-decision-on-roe.html> (cited in original guidance press announcement).

- l. HHS, “Following President Biden’s Executive Order to Protect Access to Reproductive Health Care, HHS Announces Guidance to Clarify that Emergency Medical Care Includes Abortion Services” (July 11, 2022) <https://www.hhs.gov/about/news/2022/07/11/following-president-bidens-executive-order-protect-access-reproductive-health-care-hhs-announces-guidance-clarify-that-emergency-medical-care-includes-abortion-services.html> (cited in original guidance press announcement).
- m. HHS, Letter (July 11, 2022), <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf> (cited in “Following President Biden’s Executive Order to Protect Access to Reproductive Health Care, HHS Announces Guidance to Clarify that Emergency Medical Care Includes Abortion Services”).
- n. CMS, “Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss” (July 11, 2022), <https://www.cms.gov/files/document/qso-22-22-hospitals.pdf> (cited in “Following President Biden’s Executive Order to Protect Access to Reproductive Health Care, HHS Announces Guidance to Clarify that Emergency Medical Care Includes Abortion Services”).
- o. HHS, “HHS Secretary Becerra’s Statement on Supreme Court Ruling in *Dobbs v. Jackson Women’s Health Organization*” (June 24, 2022), <https://www.hhs.gov/about/news/2022/06/24/hhs-secretary-becerras->

statement-on-supreme-court-ruling-in-dobbs-v-jackson-women-health-organization.html (describing HHS's goals in its post-Dobbs actions including its pharmacy guidances).

2) HHS impermissibly omitted the above items from the administrative record for the September 29, 2023 guidance (Revised Guidance), Dkt. 52-1, because the entire record of the Original Guidance is part of the record for the Revised Guidance, and because they continue to be cited in the Revised Guidance or in the Revised Guidance's updated press announcement, Dkt. 53-1.

3) HHS impermissibly omitted the following items from the administrative record for the Revised Guidance:

- a. The ReproductiveRights.gov website as of September 29, 2023 (cited in the revised guidance press announcement).
- b. Secretary Becerra (@SecBecerra), Twitter (Oct. 14, 2022, 6:55 PM) <https://twitter.com/SecBecerra/status/1581071321814818817> (linking to Amanda Perez Pintado, Walgreens, CVS pharmacists are withholding medications for people post-Roe; USA TODAY (Oct. 14, 2022), <https://www.usatoday.com/story/money/2022/10/13/walgreens-cvs-withholding-medications-postroe/10476400002/> (describing HHS enforcement of the pharmacy guidance, and discussed by Defendants before the Revised Mandate, see Dkt. 39).
- c. HHS, "HHS Office for Civil Rights Resolves Complaints with CVS and Walgreens to Ensure Timely Access to Medications for Women and Support

Persons with Disabilities” (June 16, 2023), <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/cvs-walgreens/index.html> (HHS’s enforcement of the original guidance, issued by Defendants).

- d. The White House, “FACT SHEET: Biden-Harris Administration Highlights Commitment to Defending Reproductive Rights and Actions to Protect Access to Reproductive Health Care One Year After Overturning of *Roe v. Wade*,” (June 23, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/23/fact-sheet-biden-harris-administration-highlights-commitment-to-defending-reproductive-rights-and-actions-to-protect-access-to-reproductive-health-care-one-year-after-overturning-of-roe-v-wade/#:~:text=The%20Administration%20is%20committed%20to,is%20the%20stabilizing%20treatment%20required> (White House’s characterization of the pharmacy mandate in the context of the administration’s responses to *Dobbs*. This was made available to HHS by virtue of the White House’s authority and usual communications to HHS, and by Plaintiffs’ submission of it into the Court record, see Dkt. 41).

Accordingly, the Court deem should these items as being included in the administrative record, or otherwise strike Defendants’ notice and certification of the record. *See, e.g., DaVita Inc. v. Scot Indus. Inc.*, No. CV 17-480, 2019 WL 13210623 at *2 (E.D. Tex. Feb. 13, 2019) (ordering the inclusion of an item in the administrative record after Plaintiffs objected to its omission and cited documents showing the agency relied on the item in making its decision, and the Court concluded

that the item “was made available to the plan administrator before Plaintiffs filed this lawsuit in a manner that gave him a fair opportunity to consider it”).

Date: November 3, 2023

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed via CM/ECF, providing electronic service to all counsel of record.

/s/ Amy Snow Hilton
AMY SNOW HILTON